TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 819.

LEWIS PUBLISHING COMPANY, APPELLANT,

vs.

EDWARD M. MORGAN, AS POSTMASTER OF THE UNITED STATES OF AMERICA IN AND FOR NEW YORK CITY, BOROUGH OF MANHATTAN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 18, 1912.

(23,394)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 19, 1912.

1 *Subpœna.*

The President of the United States of America to Edward M. Morgan, as Postmaster of the United States in and for the City of New York, Greeting:

You are hereby commanded that you personally appear before the Judge of the District Court of the United States of America for the Southern District of New York, in the Second Circuit in Equity, on the first Monday of December A. D. 1912 wheresoever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court, by The Lewis Publishing Company and to do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

Witness, Honorable George C. Holt, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 17th day of October in the year one thousand nine hundred and twelve and of the Independence of the United States of America the one hundred and thirty seventh.

ALEX. GILCHRIST, Jr., *Clerk.*

JAMES M. BECK,
Complainant's Sol'rs.

The defendant is required to enter appearance in the above cause in the Clerk's office of this Court, on or before the first Monday of December 1912 or the bill will be taken pro confesso against him.

ALEX. GILCHRIST, Jr., *Clerk.*

(Endorsed:) U. S. District Court, S. D. N. Y. Filed Oct. 17, 1912.

[Endorsed:] Eq. 375. Rec'd Oct. 17, '12. To be returned to U. S. Dist. Att'y. Service of the within subpœna is hereby admitted. New York, Oct. 17, 12. Edward M. Morgan, by Henry A. Wise, U. S. Attorney.

2 *Bill of Complaint.*

District Court of the United States for the Southern District of New York.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant,
against
EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The Lewis Publishing Company, a lawful corporation, organized and existing under and by virtue of the laws of the State of New

York, brings this its bill of complaint against Edward M. Morgan, the duly appointed and duly acting Postmaster for the United States in the City of New York, and thereupon your orator alleges and complains:

I.

That your orator is a corporation duly organized and existing under and by virtue of the laws of the State of New York
3 and is a citizen of said State and maintains its principal office and place of business at No. 826 Eighth Avenue, in the City of New York and in the Southern District of New York, and that as such corporation it is and has been for a long time engaged in the lawful business of publishing, printing, selling and distributing a certain daily newspaper called the Morning Telegraph. That the capital stock of the complainant is $10,000 and all its capital stock is invested in the said newspaper property and it thereby owns a business in which it has valuable property rights and from which it derives great gains and profits.

II.

That the defendant herein, Edward M. Morgan, was at the time of the filing of the bill and has been for a long time and at all the times hereinafter stated, the duly appointed Postmaster of the United States in charge of the United States Post Office in the City of New York, Borough of Manhattan, State of New York, and the said Edward M. Morgan is a resident and citizen of that State. That as such Postmaster he has the exclusive management of the Post Office in the City of New York and of the receipt and distribution of mail received at that City through the United States mails, subject to the laws of the United States duly enacted.

III.

That your oartor, in the publication and circulation of said newspaper has for a long time sent and is sending through the mails copies of the said newspaper to its readers and subscribers and, pursuant to the postal laws of the United States, your orator has had said newspaper entered in the said Post Office in the charge of the Defendant in the Borough of Manhattan, City of New York, as second class mail matter. That without such use of the mails it would be impossible for your orator to conduct its business without
4 substantial loss and impairment, if not complete destruction, of its property rights, including the good will of the corporation. It depends upon the mails of the United States, not merely to circulate its newspapers but also to receive from its subscribers the sums of money paid either for advertising or for copies of the paper and also for reading matter, which is contributed to its columns. If your orator were denied the use of the mails, the result would be that it would be impossible, without great expense, for your orator to collect subscriptions or sums of money for advertising, to send bills for either, to receive reading matter from its contributors, to distribute its copies and otherwise enjoy that freedom of the press which

the First Amendment to the Constitution guarantees. Exclusion from the mails would therefore mean a substantial impairment if not a complete destruction of your orator's valuable business, and unless your orator were lawfully excluded from the mails, it would be denied the facility of postal distribution, which all other owners of newspapers and all other citizens engaged in business occupations freely enjoy. That under the laws of the United States duly enacted this complainant had the right to such free and unrestricted use of the mails upon the same terms and conditions as provided for all other citizens.

IV.

That on the 24th day of August, 1912, the Congress of the United States, with the approval of the President, attempted to pass a law, entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, 1913, and for other purposes" (a part of which, viz., section 2 is hereto appended and marked Exhibit "A" and made part hereof) which section, as hereinafter stated and hereinafter referred to as "the law," was in excess of the powers delegated to such Congress by the Constitution of the United States. It provided in substance that it
5 was the duty of your orator and every other owner of a newspaper or periodical to file "not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement," giving certain information as to the details of your orator's business, as in said pretended law is more particularly set forth, and it was further provided that after said sworn statement was made to the Postmaster in the post office in which said publication was entered, the owner of such newspaper should thereupon publish in the second issue of such newspaper, after the filing semi-annually of such statements a true and correct copy of each; and it was further provided that if such unlawful and invalid requirements were not complied with "within ten days after notice" by registered letter of such failure, such *such* publication should thenceforth be "denied the privileges of the mail".

V.

Under and by virtue of the mandatory provisions of said invalid law, the Postmaster of New York, defendant herein, did serve your orator with the blanks upon which your orator was commanded to give the information as to its ownership and circulation (a copy of which notice is hereto appended, marked Exhibit "B" and made part hereof), and under and by virtue of said provision, the said Postmaster is further required, not as matter of discretion but as an absolute duty, if the law be a valid one to give your orator ten days' notice to comply with said law, and upon failure to comply, to exclude your orator's publication, the said Morning Telegraph, from "the privileges of the mail."

Your orator, believing that said law is, for reasons hereinafter stated, in violation of the Constitution of the United States and therefore null and void, has refused to execute or file said blanks or to publish same in its newspaper as required by said law and the

defendant is about to serve upon your orator in accordance
6 with the mandatory provisions of said law an exclusion notice, with the purpose of denying to your orator the privileges of the mail for any purpose.

Your orator therefore has reason to fear, unless he complies with the alleged law in question, a summary denial of the privileges of the mail, which as hereinbefore stated would inflict irreparable loss and damage upon your orator and its business, and result in a virtual confiscation of its business.

VI.

Your orator avers and humbly submits to your honorable Court that the said pretended law is null and void, in that it has been enacted in excess of the powers delegated to the Federal Government and in violation of the rights reserved to the several States or the people thereof under the Tenth Amendment to the Constitution.

Your orator avers that the said pretended Act of Congress was not enacted as an incident to or in exercise of any right delegated to the Federal Government, but is an attempt to regulate journalism by constituting an inquisition into the business details of the newspaper periodical corporations of the United States and into the circulation of the newspapers, not authorized by the Constitution of the United States.

VII.

Your orator further suggests that such an inquisitorial examination into the business details of your orator and the circulation of its publication and the threatened denial of the privileges of the mail would be an abridgement of the freedom of the press and therefore in violation of the First Amendment to the Constitution.

VIII.

Your orator further avers and humbly submits that the mandatory provision that your orator shall insert twice a year in
7 its publication a copy of said sworn statement is an attempted appropriation by the Government of space in your orator's publication, which is valuable, and is furthermore an appropriation of the capital, labor and property of your orator, which would thus be used without its consent and against its protest by the Government for the purpose of accomplishing a purpose which is not within the scope of powers delegated under the Constitution of the United States to the Federal Government and that for these reasons such enforced appropriation of a portion of your orator's publication and such enforced utilization of its machinery, capital and labor facilities is a taking of property without due process of law, in violation of the Fifth Amendment to the Constitution in that it deprives your orator of its property "without due process of law" and also takes your orator's private property for public use without just compensation.

IX.

Your orator further avers and humbly submits that the power delegated by the Constitution of the Federal Government "to es-

tablished post offices and post roads" is a power designed to create and operate the ordinary facilities of circulation by governmental mails, without discrimination and with equal privileges to all, and that the power thus granted is limited to the creation of post roads and post offices and the physical transportation of the mails, but that it does not include as a reasonable or necessary incident a right to regulate the business of those who thus utilize the facilities of the mails and that the attempt by the present alleged law to regulate the business of journalism by compelling the owners of newspapers to conform to the inquisitorial methods provided in said Act, and to disclose the details of their business to their competitors and the public generally, under penalty, if they fail to do so, of exclusion from the mails, is a perversion of the federal power over post
8 offices and post roads, for which the Constitution of the United States has no warrant and which is in violation of the Tenth Amendment to the Constitution, reserving to the States or the people thereof all rights not expressly or by fair implication delegated to the Federal Government.

Your orator therefore avers and humbly submits that as the Constitution did not attempt to delegate the power to the Federal Government to regulate journalism, this denied power thus reserved to the States or the people thereof cannot be indirectly exercised by penalizing publishers through the exclusion of their publications from the mails and thus attempting by the duress of threatened injury to compel the acquiescence in the exercise of unconstitutional powers.

X.

Your orator further avers and humbly submits that as all other business and gainful occupations of the United States, which are not contrary to morality or health, are allowed to use the mails without discrimination and without an inquisitorial examination into the facts of their ownershop or the extent of their business, an attempt to deny to the owners of newspapers the same equal and unrestricted facilities in the matter of the mails would be a virtual and substantial denial to the owners of newspapers, including your orator, of the equal protection of the law, thus depriving your orator of its liberty of contract and property without due process of law.

XI.

That under further provisions of the said law it is also provided that all editorial and other reading matter published in such a newspaper as that published by your orator, for the publication of which money or other valuable consideration is paid, accepted or promised, when so published shall be plainly marked "Advertisement,"
9 and it is further provided that any failure thus to mark such reading matter as an advertisement, shall subject the editor or publisher of the paper to a criminal prosecution, and in the event of a conviction, to a penalty of not less than $50 nor more than $250.

Your orator has been in the habit for some years and is now publishing in certain of its issues certain classes of reading matter, not of general interest to all its readers but of special interest to some of

its readers, which insertion is for the interest of those contributing thereto and for which the said contributors pay to your orator a reasonable sum for the privilege of inserting such reading matter and the cost of such publication.

Your orator avers and humbly submits that as the publication in question is published with its capital and by its labor and is its private business, it has the right to sell its space upon such terms and conditions as to it shall seem proper and as may be agreed upon by mutual agreement between your orator and its contributors.

Your orator avers that the said pretended law, regulating the methods of advertising, seeks to make such reading matter unlawful and unmailable and that while the law in question does not specifically provide for the exclusion of such matter from the mails, yet as it cannot be separated from the rest of the newspaper, it would be the duty of the Postmaster, if the said law were valid, to exclude from the mails any publication, including that of your orator, in which reading matter thus paid for was published without being specifically marked as an advertisement.

Your orator avers and humbly submits that this section of the law is null and void and in violation of the Constitution of the United States, for all the reasons herein specifically stated with reference to the other provisions of the law and to which reference is craved without unnecessary repetition.

Your orator avers that in addition to the other constitutional guarantees, which the said pretended Act of Congress seeks to violate, this last referred to provision further violates the liberty of contract which is further guaranteed to your orator and its contributors by the Constitution of the United States.

XII.

By reason of the premises, your orator submits that if the Postmaster of New York, defendant herein, be permitted to enforce the said unconstitutional law, great and irreparable damage will be inflicted upon your orator in violation of his constitutional rights and that to prevent said unlawful injury, it is to the interest of the United States and the people thereof and to your orator's interest, that such unlawful injury shall be prevented and your orator is advised by counsel that to accomplish this result there is and can be no adequate remedy at law, and that the only remedy open to your orator to prevent such irreparable injury is for your honorable Court, as a court of equity, to exercise its great remedial power of a writ of injunction to the end that the officer of the United States, the defendant herein, shall not in violation of the Constitution of the United States and in violation of your orator's property and personal rights, attempt to carry out said null and void law.

To the end therefore that your orator may have the relief which it can only obtain in a court of equity and that the defendant may answer the premises, but not upon oath or affirmation, the benefit whereof is hereby expressly waived by your orator, your orator prays:

1. That it be adjudged and decreed that all the sections and pro-

visions of the said pretended Act of Congress are illegal and void and in violation of the Constitution of the United States and that the defendant herein, either as an individual or as Postmaster for the United States in the City of New York, Borough of Man-
11 hattan, has no right to act thereunder either against your orator or against any other citizen.

2. That as no complete relief could be granted by your honorable Court without the preservation of the status quo and as the temporary enforcement of the law would inflict irreparable loss upon your orator, even though the final decree of your honorable Court were in favor of your orator, therefore your honorable Court shall issue against the defendant herein named a temporary injunction restraining him and any and all persons acting through or under him and any and every person acting under and by virtue of the authority of said invalid law, from in any way enforcing or attempting to enforce the said law (set forth in Exhibit "A") or any of the provisions thereof against your orator, and that a restraining order may be granted against the defendant and any and all persons acting through him and them likewise from proceeding under said alleged law until your honorable Court shall determine on motion and hearing whether a temporary injunction with like effect shall not be granted pendente lite.

3. Your orator further asks such further relief as to your honor shall seem meet and shall hereafter seem necessary.

[SEAL.] THE LEWIS PUBLISHING COMPANY,
By JOHN H. DELANEY, *Secretary.*

JAMES M. BECK,
Counsel for Complainant.

Oct. 17, 1912.

12 UNITED STATES OF AMERICA,
Southern District of New York, ss:

On this 17th day of October, 1912, before me personally appeared John H. Delaney, to me known and known to me to be the Secretary of the above named Lewis Publishing Company, a New York corporation, who made oath that he is the Secretary of such corporation; that he had read the foregoing bill of complaint subscribed by him and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

JOHN H. DELANEY. [SEAL.]

Sworn to before me October 17, 1912.

MORRIS PALLINGER, [SEAL.]
Notary Public, New York County, No. 102.

13 EXHIBIT "A."

"(Public No. 336.)

"(H. R. 21279.).

"An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated for the service of the Post Office Department, in conformity with the Act of July second, eighteen hundred and thirty-six, as follows: * * *

"SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and *and* the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided Further, That it shall not be necessary to include in such statement the names of persons owning less than one
14 per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

EXHIBIT "B."

[Duplicate.]

POST OFFICE, NEW YORK, N. Y.,
OFFICE OF THE POSTMASTER,
SEPTEMBER 20, 1912.

2 Encs.

Publisher "The Morning Telegraph," 826 Eighth Avenue, New York, N. Y.

DEAR SIR: Your attention is invited to the following provisions of the Postal Laws and Regulations:

SEC. 467½. It shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation, and also the names of known bondholders, mortgagees, or other security holders; and also in the case of daily newspapers, there shall be included in such statement the average of the numbers of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months. Provided, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: Provided further, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure. (Act of Aug. 24, 1912.)

2. All editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked "advertisement." Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500). (Act of Aug. 24, 1912.)

3. The statement required by this section shall be made in duplicate, on Form 3526, and both copies delivered to the postmaster at the office of entry of the publication. The postmaster will forward one copy to the Third Assistant Postmaster General (Division of

Classification) and retain the other in the files of the post office.
To enable publishers to file such statement promptly, post-
16 masters will furnish them copies of Form 3526 at least ten days prior to the first days of April and October of each year.

4. Postmasters will obtain for the files of their offices two copies of the issue of each publication at their respective offices in which the required sworn statement is published.

Two copies of Form 3526 are enclosed herewith for the sworn statement regarding your publication required under this law. Please note that the statement must be executed in duplicate and see that each is properly sworn to and that the two copies are sent to Room 4, General Post Office, *on or before October 1, 1912.*

Your attention is also invited to the requirement of the law that the sworn statement referred to above must be published in the second issue of your publication printed next after the filing of such statement and that two copies of the issue in which the sworn statement is published must be furnished. These copies should be sent to Room 4, General Post Office.

Very respectfully,

EDWARD M. MORGAN, *Postmaster.*

Statement of the Ownership, Management, Circulation, Etc.

of .....published .....
(Insert title of publication.) (State frequency of issue.)

at....., required by the Act
(Name of post office.)

of August 24, 1912.

NOTE.—This statement is to be made in duplicate, both copies to be delivered by the publisher to the postmaster, who will send one copy to the Third Assistant Postmaster General (Division of Classification), Washington, D. C., and retain the other in the files of the post office.

17

Name of—	Post-office Address.
Editor	
Managing Editor	
Business Managers	
Publisher	

Owners: (If a corporation, give names and addresses of stockholders holding 1 per cent or more of total amount of stock.)

Known bondholders, mortgagees, and other security holders, holding 1 per cent. or more of total amount of bonds, mortgages, or other securities:

....
....
....
....

(If additional space is needed, a sheet of paper may be attached to this form.)

Average number of copies of each issue of this publication sold or distributed, through the mails or otherwise, to paid subscribers during the six months preceding the date of this statement. (This information is required from daily newspapers only.) .....

.....
(Signature of editor, publisher, business manager or owner.

Sworn to and subscribed before me this — day of ——, 191–.
[SEAL.] —— ——,
—— ——.

(My commission expires —— —, 191–.)

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

18 *Notice of Appearance.*

In the United States District Court for the Southern District of New York.

In Equity.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law, Complainant,
vs.
EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

To the clerk of said court:

Please enter my appearance as solicitor for the defendant Edward M. Morgan, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, in the above-entitled case.
Dated, New York, October 17, 1912.

HENRY A. WISE,
United States Attorney for the Southern District of New York.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 17, 1912.

19 *Demurrer.*

In the United States District Court for the Southern District of New York.

In Equity.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law, Complainant,

vs.

EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

The Demurrer of Edward M. Morgan, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant, to the Bill of Complaint of the Lewis Publishing Company, a Body Corporate in Law, Complainant.

The above-named defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill to be true, in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer shows:

(1) That the said complainant has not in and by said bill of complaint made or stated such a cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for from or against this defendant;

(2) That the said complainant has not in and by said bill of complaint exhibited such a cause as entitles it in a court of equity to any relief against this defendant, as to the matters contained in the said petition, or any of such matters.

20 Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant does demur to the said bill of complaint and to all matters and things therein contained, and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to the said bill of complaint or any of the matters or things therein contained, and does further pray to be hence dismissed with his reasonable costs and charges in this behalf sustained.

Dated, New York, October 17, 1912.

HENRY A. WISE,
United States Attorney for the Southern District of New York, Solicitor for Defendant.

21 STATE OF NEW YORK,
County of New York, ss:

Henry A. Wise, being duly sworn, says, that he is the solicitor herein for Edward M. Morgan, Postmaster of the United States in and for the City of New York, the defendant herein; that he is familiar with the facts herein; that said Edward M. Morgan is absent from the City of New York, and accordingly cannot verify this affidavit, and for that reason deponent makes this affidavit, and declares that the foregoing demurrer is not interposed for the purpose of delay.

HENRY A. WISE,
Solicitor for Defendant.

Subscribed and sworn to before me this 17th day of October, 1912.

(Signed) FREDERICK L. CAMPBELL,
[SEAL.] *Notary Public, Kings Co.*

Cert. filed in N. Y. Co.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

HENRY A. WISE,
Solicitor for Defendant.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

22 *Decree Sustaining Demurrer and Dismissing Bill of Complaint.*

In the United States District Court for the Southern District of New York.

In Equity.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant,
vs.
EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

This cause came on to be heard at the October Term of this Court, 1912, and was argued by counsel, and thereupon, upon the consideration thereof, it was

Ordered, adjudged and decreed, that the demurrer to the bill of complaint herein be and the same hereby is sustained, upon the ground that the said complainant has not, in and by the said bill of complaint, made or stated any such cause as does or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against the defendant, and that the said bill

of complaint be and the same hereby is dismissed, with costs to be taxed by the Clerk of this Court.

Dated, this 17th day of October, 1912.

(Signed) LEARNED HAND,
Judge of the United States District Court
for the Southern District of New York.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

23 District Court of the United States for the Southern District of New York.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant,
against
EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

Petition for Appeal.

The above named plaintiff, believing that the final decree, entered on the 17th day of October, 1912, in the above entitled proceeding in favor of the defendant and against this complainant, is in contravention of the Constitution of the United States and in violation of the rights secured to the plaintiff under the Constitution of the United States (as appears more particularly in the assignment of errors herewith filed) doth hereby appeal from the said decree to the Supreme Court of the United States, and having filed with the Clerk of this Court its assignment of errors, the complainant prays this court to allow an appeal to the Supreme Court of the
24 United States from the said decree and that a certified transcript of the record upon which the said decree was made be transmitted to said Court.

Dated, New York, October 17, 1912.

JAMES M. BECK,
Solicitor for Complainant.

Allowed this 17th day of October, 1912.

LEARNED HAND,
District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

25 District Court of the United States for the Southern District of New York.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law, Complainant,
against
EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

Assignment of Errors by the Complainant in the Above-entitled Case.

And now on the 17th day of October, 1912, comes the complainant in the above entitled case and says that in the record and proceedings in the above entitled case and in the final decree entered therein, there is manifest error in each and every one of the following particulars, to wit:

1. Because the Court, in sustaining the demurrer to the bill of complaint has held that the said bill of complaint did not constitute a cause of action.

2. Because the Court sustained the demurrer to the sufficiency of the said bill of complaint and dismissed the bill.

3. Because the Court failed to decree the relief prayed for
26 in said bill, the facts alleged in said bill of complaint having been admitted by the demurrer.

4. Because the Court adjudged by said decree that section 2 of the Act of Congress approved the 24th day of August, 1912, entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1913, and for other purposes," which section is fully recited in Exhibit "A" to complainant's bill of complaint, was not in violation of the First Amendment to the Constitution of the United States.

5. Because the Court adjudged by said decree that said section 2 of said Act was not in violation of the Fifth Amendment to the Constitution of the United States.

6. Because the Court adjudged by said decree that said section 2 of said Act was not in violation of the Tenth Amendment to the Constitution of the United States.

7. Because the District Court erred in adjudging by said decree that so much of section 2 of said Act as requires the complainant, as the owner and publisher of a daily newspaper, to disclose to the Post Office Department of the United States the details of its ownership and the extent of its circulation was not in violation of the First, Fifth and Tenth Amendments to the Constitution of the United States.

27 8. Because the District Court erred in adjudging by said decree that so much of section 2 of said Act as attempted to compel the complainant to publish in its newspaper, the Morning Telegraph, a copy of the statement required by said law as to its ownership and the extent of its circulation was not in violation of the Fifth and Tenth Amendments to the Constitution of the United States.

9. Because the Court failed to adjudge and decree that the said section 2 of the said Act was as an entirety and in all its parts in violation of the First, Fifth and Tenth Amendments to the Constitution of the United States, in that its enforcement would in the case of the complainant abridge the freedom of the press, would take its property without due process of law and for public use, without just compensation, would involve an unreasonable search and seizure and would deprive it of property rights and of the right to liberty of contract reserved to it under the Tenth Amendment to the Constitution.

Wherefore the appellant, complainant in the Court below, prays that the decree of said Court may be reversed, and in order that the foregoing assignment of errors may be a part of the record, the complainant presents the same to the Court and prays that such
28 disposition may be made thereof as in accordance with law and the Statute of the United States in such case made and provided.

JAMES M. BECK,
Solicitor for Complainant.

Dated, New York, October 17, 1912.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Oct. 17, 1912.

29 District Court of the United States for the Southern District of New York.

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law, Complainant,
against
EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant.

On motion of James M. Beck, Solicitor for complainant, it is

Ordered, that the appeal to the Supreme Court of the United States from the final decree, filed and entered herein on the 17th day of October, 1912, be, and the same hereby is, allowed; and that a certified transcript of the record and all the proceedings herein be forthwith transmitted to the said United States Supreme Court, at Washington, D. C.

And it is, further,

Ordered, that the bond on appeal herein be fixed at the sum of $250, the same to act as a supersedeas bond and also as a bond in costs and damages on appeal.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York.

Dated, October 17, 1912.

30 The filing of the within bond is hereby waived.
New York, Oct. 17, 1912.

HENRY A. WISE,
U. S. Attorney,
Solicitor for Defendant.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Oct. 17, 1912.

31 THE UNITED STATES OF AMERICA, *ss:*

To Edward M. Morgan, as Postmaster of the United States of America in and for New York City, Borough of Manhattan, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the Capitol, in the City of Washington, District of Columbia, within thirty days from the date of this appeal duly allowed by the District Court for the Southern District of New York on the 17th day of October, 1912, and filed in the Clerk's office of said Court on the 17th day of October, 1912, in a cause wherein the Lewis Publishing Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned should not be granted and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 17th day of October, A. D. 1912.

LEARNED HAND,
United States District Judge for the
Southern District of New York.

32 [Endorsed:] E. 89/375. E. 9. 375. U. S. District Court, Southern District of New York. The Lewis Publishing Company, etc., against Edward M. Morgan, as Postmaster, etc. 10. Citation on Appeal. U. S. District Court, Oct. 17, 1912. — M. S. D. of N. W.

33 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE LEWIS PUBLISHING COMPANY, a Body Corporate in Law,
Complainant-Appellant,
vs.
EDWARD M. MORGAN, as Postmaster of the United States in and for the City of New York, Borough of Manhattan, Defendant-Appellee.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled matter.

In Testimony whereof, I have caused the seal of the said Court
be hereunto affixed, at the City of New York, in the Southern D
trict of New York, this Seventeenth day of October, in the year
our Lord one thousand nine hundred and twelve, and of the In
pendence of the United States the one hundred and thirty-seven

[Seal District Court of the United States, Southern
District of N. Y.]

ALEX. GILCHRIST, JR., *Clerk*.

34 [Endorsed:] United States Supreme Court. The Le
Publishing Company, a body corporate in law, Complainan
Appellant, vs. Edward M. Morgan, as Postmaster of the Unit
States in and for the City of New York, Borough of Manhattan, I
fendant-Appellee. Transcript of Record. Appeal from the Distr
Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 23,394. S. New York, D. C. U.
Term No. 819. Lewis Publishing Company, appellant, vs. Edwa
M. Morgan, as postmaster of the United States of America in a
for New York city, borough of Manhattan. Filed October 18
1912. File No. 23,394.

No. 819.

Supreme Court of the United States.

OCTOBER TERM, [illegible].

NO.

THE LEWIS PUBLISHING COMPANY,
a body corporate in law,
Complainant-Appellant,

against

EDWARD M. MORGAN, Postmaster in and for the
City of New York,
Defendant-Appellee.

MOTION TO ADVANCE.

JAMES M. BECK,
Counsel for Lewis Publishing Company, Appellant.

C. G. [illegible], [illegible] Street, New York.

No. .....

Supreme Court of the United States,

OCTOBER TERM, 1912.

THE LEWIS PUBLISHING COMPANY, a body corporate in law,
Complainant-Appellant,

AGAINST

EDWARD M. MORGAN, Postmaster in and for the City of New York,
Defendant-Appellee.

Now comes the said appellant by James M. Beck his attorney and moves this honorable Court to advance this cause upon the docket and set it down for hearing upon a day certain and to hear it as soon as the convenience of the Court will permit and for the reasons therefor he states. The appellant asks that the case be advanced so that it can be heard concurrently with the case of Journal of Commerce vs. Hitchcock *et al.* (October Term, 1912, No. .....), which involves substantially the same question and as to which a similar motion to advance is now pending.

Statement of Facts.

This action is brought by the Lewis Publishing Company, the owner and publisher of a daily newspaper in the City of New York, called the Morning Telegraph, against Edward M. Morgan, Postmaster of the United States for the City of New

York, and seeks to enjoin the said Postmaster from denying to the complainant the privileges of the mail for not complying with the provisions of section 2 of an Act approved August 24, 1912, entitled, "An Act making appropriations for the service of the Post Office Department", etc. This section, *the constitutionality of which is in dispute*, is quoted in full as an appendix to this motion (see Exhibit "A").

The law in question is a novel departure in Post Office legislation and, as we shall contend, in effect attempts to regulate the business of journalism, while pretending to regulate the transportation of the mails. It provides for an inquisitorial examination into the ownership of newspapers (including mortgage creditors thereof), and the extent of their circulation, and it further attempts to compel the newspaper to publish semi-annually at its own expense these details of their business, not apparently for the benefit of the Post Office Department, but for the assumed benefit of the public.

It further regulates the methods of journalism by providing that if the editor or publisher shall accept any compensation for any editorial or other reading matter and publishes such matter without plainly marking it as an advertisement, such editor or publisher shall be prosecuted criminally and upon conviction fined.

The Legislation in question is therefore novel and drastic. It denies the editors and publishers of the country, of whom there are many thousands, the privilege of utilizing their capital, property, plant and labor facilities to their own advantage, and it compels every newspaper to disclose the extent of its circulation notwithstanding that such disclosures would necessarily put the newspaper of small circulation at a serious disadvantage in obtaining advertising as against the newspaper of large circulation.

On this motion to advance it is not necessary to amplify the serious inconvenience and unnecessary injury which this legislation would cause to the publishers of newspapers and periodicals in this country.

As no attempt has hitherto been made by the Federal Government to regulate journalism (except in so far as the transmission through the mails of immoral literature is concerned), *it is obvious that this Court has never passed upon the validity of such legislation under the Constitution of the United States.*

Counsel for the complainant and other counsel, who have carefully considered the question, are clearly convinced that this legislation violates the First, Fifth and Tenth Amendments to the Constitution of the United States in that it is—

(a) A substantial abridgement of the freedom of the press.

(b) It deprives the owners of newspapers of their property without due process of law and attempts to appropriate their property for an assumed public use without compensation.

(c) It seeks to exercise a supervisory power over the methods of journalism not germane to the due regulation of postal facilities, which power the Constitution of the United States has neither in express terms nor by reasonable implication granted to the Federal Government.

Underlying these grave constitutional questions, which even a cursory reading of the proposed law suggests, *there is an underlying constitutional question of grave import and far reaching consequences. How far can Congress, under the pretext of exercising an unquestioned federal power, such as the power "to establish post offices and post roads," so use that power as to accomplish objects not within the scope of the Federal Government?*

This Court disclaimed, in the Lottery Case (188 U. S. 321) any power of the Federal Government to exercise "arbitrarily" even the plenary power over interstate commerce. Can therefore the Federal Government deny the equal privilege of the mails to any citizen, unless he will comply with demands which the Federal Government otherwise could not make?

No attempt will be made in this motion to argue the merits of these grave questions. The Attorney General of the United States has recognized the importance of the case, and I am authorized by the Solicitor General to state on behalf of the United States, that he "concurs in the application to advance the case".

These questions should be given an early hearing and a speedy decision, both in the interests of the Government and in the interests of many thousand publishers of newspapers and periodicals. The officials of the Government, on the one hand, should be promptly advised whether they are under obligation to enforce this novel and drastic Statute. If no decision be speedily reached, many

publishers will acquiesce, as some have already done, in the requirements of this unconstitutional law, rather than litigate the matter with the Government, and thus the officials of the Government, on the one hand, will unwittingly inflict, and the publishers on the other hand will involuntarily suffer, irreparable loss and damage. If the law be unconstitutional, this irreparable harm to a legitimate industry should be promptly ended.

The case is therefore of general and urgent importance and I earnestly submit that your honorable Court should grant this motion.

New York, October 17, 1912.

JAMES M. BECK,
Counsel for Appellant.

Exhibit "A."

" (Public No. 336)
" (H. R. 21279).

" An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes.

" *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums be, and they are hereby, appropriated for the service of the Post Office Department, in conformity with the Act of July second, eighteen hundred and thirty-six, as follows: * * *

"SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: *Provided, Further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the pro-

visions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised, without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

12

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 819.

THE LEWIS PUBLISHING COMPANY,
a body corporate in law,
Complainant-Appellant,

against

EDWARD M. MORGAN, Postmaster in and for the City of New York,
Defendant-Appellee.

THE INVALIDITY OF A FEDERAL CENSORSHIP OF THE PRESS.

BRIEF FOR APPELLANT.

JAMES M. BECK,
Counsel for Appellant.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

INDEX.

Cases and Authorities Cited.

Supreme Court of the United States.

THE LEWIS PUBLISHING COMPANY, a body corporate in law,
Complainant-Appellant,

AGAINST

EDWARD M. MORGAN, Postmaster in and for the City of New York,
Defendant-Appellee.

BRIEF FOR THE APPELLANT.

Statement of Facts.

The newspaper law,* whose constitutionality is in this suit called into question, is neither in form nor substance a law to regulate the carriage of the mails but *to regulate journalism.*

In this respect it has the merit of sincerity. It does not pretend to be in aid of the Post Office De-

*Reprinted in full as an appendix. (*Post*, p. 51.)

partment. That Department did not seek its enactment but protested against it.*

The law in question makes no reference to the mails except that it uses exclusion therefrom *as a means of enforcing this censorship of the press.*

Even this remote connection is wanting in the latter section of the law, which requires paid reading matter to be formally branded as an advertisement. Its enforcement is left to a criminal action for a penalty.

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* When the bill was under consideration before the Senate Committee on Post Offices and Post Roads, the Postmaster General addressed a formal letter to Senator Bourne, the Chairman of the Committee, in which, after discussing other details of the general appropriation bill, he made this specific protest against the passage of the newspaper section:

> "I also call your attention to that portion of the bill beginning on Page 33, Line 19, which requires the insertion in newspapers and periodicals of the name of the owner or owners and the managing editor or managing editors, and also that matter for the insertion of which a charge is made by the publishers should be marked as an advertisement or private name of the writer signed thereto. *In my judgment this provision is not only needless, but will be positively harmful, as it will require the continuous use of valuable space in the publication and at the same time be resented as a censorship of the press.*
>
> One of the greatest difficulties now encountered in the enforcement of the laws relating to second-class mail privileges is the fact that the Post Office Department is under its duty compelled to make inquiry into many aspects of the private business of publishers. This gives rise to the complaint, though ill-founded, that the Government carries on a needless interference with the privileges of the press. The *only possible service* to be rendered by such a provision would be the identification of the owners and writers of newspapers and periodicals in order to hold them for contractual obligations or for libelous printed matter, both of which would be matter under the jurisdiction of the State and not the Federal authorities.
>
> *I am of the opinion that it should be the constant aim, not only of Congress, but of the Post Office Department as well, to lessen the necessity for supervision of the public press in order to administer the postal laws and regulations. I earnestly hope that the provision referred to will not become law.*"

The law has two plainly avowed objects.

The first is to compel a disclosure to the Government, under oath, of the names and addresses of the editors, publishers, business managers and owners, stockholders, security creditors and the daily circulation of such newspapers for the preceding six months.

This will be hereafter referred to as the inquisitorial provision.

The second object is to compel a disclosure to the public through newspaper publication of these facts and also whether any editorial or reading matter in such publication has been inserted for a valuable consideration.

This will be hereafter referred to as the publicity provision.

The publicity provision cannot be referred to any proper function of the Post Office Department. Its function is to carry the mails and in such carriage it cannot matter whether *the public* are advised as to the ownership, editorial direction and circulation of a newspaper or not, or whether the matter which it publishes is published for a consideration.

The requirement that the publishers shall file a sworn statement on these matters with the Post Office Department was not intended as a means of determining whether a newspaper was in fact entitled to the privileges of second-class rates, for as the Attorney General, in the opinion which he has given to the Postmaster General with reference to this law, plainly points out, the Post Office Department already

has all of the inquisitorial power that it needs for this purpose.*

The history of the legislation also makes it clear that the purpose of the Act was not to enable the Post Office Department to carry on its work but to regulate journalism for the supposed benefit of the public.

While resort may not be had to the debates in Congress to determine the *interpretation* of a statute, yet

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* The Attorney General says:

"Independently of this amending act, in order that the Postmaster General may determine whether or not a publication applying to be admitted to the second class has a legitimate list of subscribers, and is not designed primarily for advertising purposes, or free circulation, or for circulation at nominal rates, the Postmaster General is entitled to require full and complete statements showing the character of the business of the publication, and by section 436 of Regulations (Edition of 1902) he has required Postmasters to secure satisfactory evidence that publications so offered for entry have 'a legitimate list of subscribers approximating 50% of the numbers of copies regularly issued and circulated, by mail or otherwise, made up, not of persons whose names are furnished by advertisers or by others interested in the circulation of the publication, but of those who voluntarily seek it and pay for it with their own money, although this rule is not intended to interfere with any genuine case where one person subscribes for a definite period of several issues for a limited number of copies for another.'

And by section 438 the Postmasters are directed to require the proprietor or duly authorized representative, on applying for second-class mail privilege, to furnish detail information of a character deemed requisite by the Postmaster General to enable him to determine whether or not the publication falls within the requirements of the acts of Congress. The right of the Postmaster General to exact this information is in no respect impaired or affected by the provisions of the Statute under consideration.

Those provisions are inserted as a part of the Act of 1912, which is apparently designed to insure publicity as to the ownership and control of a publication. This particular clause was inserted by amendment just before the passage of the Act, and bears no ascertainable relation to the subject matter of the paragraph in which it was inserted."

they can be examined when the *object* of a statute is a pertinent matter.* The proponents in Congress of this novel law, very frankly admitted that the purpose of the act was to regulate journalism, rather than the mails. The debates may be searched in vain for any suggestion that the efficient carriage of the mails was the object of the legislation.*

The face of the statute shows its true purpose.

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* Senator Bourne, Chairman of the Committee on Post Roads, said:

> "I assume the desire is to furnish the public information as to the possible bias of the paper incident to ownership or incident to obligations of the paper or its owners to individuals."

Another advocate of the legislation, Senator Reed of Missouri, said that

> "the purpose of the proposed law was that the people who read the newspapers should be advised of the control back of the news papers."

When the proposed legislation was originally suggested in the House of Representatives, Congressman Henry of Texas, Chairman of the Committee on Rules, stated that its purpose was

> "that the American people may see the men who stand behind the guns trained against public officials."

When the addition with reference to the printing of paid matter was added, its proponent, Congressman Barnhardt of New York, stated as its purpose that this provision

> "will not cost the people anything but will conserve honesty and public confidence in one of the greatest educational factors in the world."

Congressman Victor Berger, of Wisconsin, said:

> "It seems to me that the politicians are trying to get even with the newspapers, which are continually prying into the private affairs of the politicians. The politicians want to know everybody connected with the papers and thus get the best of them. You can never do it, gentlemen, because in the end the newspapers will have the last word every time, no matter what you do. If you get the ill will of your own party papers, you might just as well quit the political game. Moreover, there is a grave danger lurking behind the proposition. The freedom of the press is involved."

* See U.S. v. Press Co., 219 U.S. 1.

Religious, fraternal, temperance, scientific or other similar publications, are exempted from its provisions, and the requirement as to disclosure of circulation is further limited to daily newspapers.

If it be desirable that the Postmaster General before admitting a periodical to second class rates or to the privileges of the mail at all, shall require a statement of its average circulation, such requirement, so far as the Post Office Department is concerned, must be quite as important in the case of a religious or scientific journal as an ordinary newspaper, and certainly there can be no reasonable distinction as to such publicity between a weekly and daily newspaper. This discrimination shows that the law attempts to regulate the instrumentalities of public opinion, the newspaper press, and that the carriage of the mails or the right to second class matter was not the object of Congress. It attempts to ascertain who are responsible for daily newspapers, and the extent of their influence as measured by circulation.

Congress sought to censor the press by compelling disclosure and publicity of facts vital to its influence under the penalty of exclusion from the mails, a penalty sufficiently drastic, for such exclusion would wreck any publication. The penalty is not merely exclusion from the privilege of *second-class* rates or a denial of the carriage of the newspaper through the mails. The owners and publishers, who refuse to comply with the law, are denied the privilege of the mails for any purpose. As to paid matter, they are subject to indictment and a fine.

With the policy of this law, this Court has no concern. It can only inquire whether it is a valid law under the Constitution.

My argument against its validity will be divided into three propositions—

1. The Constitution has not either under the Post Roads clause or elsewhere delegated to the Federal Government the power (1) to compel these disclosures and (2) to direct their publication or (3) to compel paid reading matter to be marked as an advertisement.

2. The Constitution not only failed to give such power but it expressly forbade it, by the First Amendment, prohibiting any law "abridging the freedom of the press."

3. The requirement that a certain class of newspapers shall disclose to the public by publication the most intimate details of their business, and use their own capital, labor facilities and valuable space for such disclosure, is a taking of "liberty" and "property" without due process of law and a like taking of valuable property rights for an assumed public use without just compensation."

ARGUMENT OF THE LAW.

I.

The Constitution has not either under the Post Roads clause or elsewhere delegated to the Federal Government the Power (1) to compel these disclosures and (2) to direct their publication or (3) to compel paid matter to be marked as an advertisement.

While no *express* power for such a law will be claimed the Government will seek to sustain it as an *implied* power necessary to the *express* power "to establish post offices and post roads" (Art. I., Sec. 8). It has been well said:

> "No other constitutional grant seems to be clothed in words which so poorly express its object or so feebly indicate the particular measures which may be adopted to carry out its design. To establish post offices and post roads is the form of the grant; to create and regulate the entire postal system of the Government is the evident intent."
>
> Pomeroy on Constitutional Law, Sec. 411.

It was originally thought—indeed as late as the administration of President Monroe—that the only purpose of the grant was to designate the routes over which the mails should be carried and the post offices where it should be received and distributed. At the time the Constitution was framed, the carriage of the mails was a private enterprise, although the estab-

lishment of post offices was a governmental function. This was the view of President Monroe, when he vetoed the Cumberland Road Bill on May 4, 1822. The carriage of the mails is therefore in itself an implied power.

These earlier and narrow views of an important governmental power are, however, academic, for I freely concede that, however unhappily expressed, the Constitution meant to give to the Federal Government full power to make a monopoly of the carriage and distribution of the mails, and that all "*necessary and proper*" means are to be regarded as fairly embraced in the power.

The present law as an alleged implied power must therefore be subjected to the acid test of Chief-Justice Marshall:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means *which are appropriate*, which are *plainly adapted to that end*, which are not prohibited but *consistent with the letter and spirit of the Constitution*, are constitutional."

Is the enforced disclosure and publication of the most intimate secrets of the ownership and editorial management of a newspaper and the circulation thereof a means "*plainly adapted*" to the carriage of the mails?

Is it an "*appropriate*" method?

Is it "*consistent with the letter and spirit of the Constitution*," in view of the express declaration that the freedom of the press shall not be "*abridged*?"

When governmental powers—only *enumerated* in the Constitution in the broadest and most general way—pass to the stage of necessary definition through judicial decisions, restrictions are imperatively necessary, unless the Constitution itself is to fall into cureless ruin.

The commanding genius of Marshall and his associates quickly recognized the absolute necessity of the judiciary confining both the national and State Governments within their respective spheres by so *defining the enumerated powers* as to create a harmonious though dual system.

In the case of McCulloch v. Maryland, 4 Wheaton, 423, the Chief Justice laid down for all time this great and absolutely necessary rule of interpretation as follows:

> "Should Congress, *under the pretext of executing its powers*, pass laws for the accomplishment of objects *not entrusted to the Government*, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, *to say that such an act was not the law of the land.*"*

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* Hamilton, in the Federalist No. 33, said:

> "The priority of a law in a constitutional light must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority (which, indeed, cannot be easily imagined) the federal legislature should attempt to vary the law of descent in any state, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the state? Suppose again that upon the pretense of an interference with its revenues it should undertake to abrogate a land tax imposed by the authority of the state, would it not be equally evident that this was an invasion of

The government may contend that the later decisions of this Court modify, if not altogether abrogate, this primary and vital principle of constitutional construction. The line of cases, of which Veazie v. Fenno, 8 Wall., 533, is the leading case, will probably be cited, in which the doctrine is laid down in various forms but substantially to the following effect:

> "The judiciary cannot prescribe to the legislative departments of the Government limitations upon the exercise *of its acknowledged powers.* The power to tax may be exercised oppressively upon persons, but the responsibility of the Legislature is not to the courts, but to the people by whom its members are elected."

It was clearly shown in subsequent decisions that the decision in Veazie v. Fenno was amply justified in the exclusive power of the Federal Government to establish an exclusive currency, with the incidental power to "restrain by suitable enactments the circulation money the notes not issued under its own authority." The statement in that case, therefore, that "the judiciary cannot prescribe the legislative

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that concurrent jurisdiction in respect to these species of tax which the Constitution plainly supposes to exist in the State governments?"

The fatal effect upon constitutional government of any other course was pointed out by Senator Hayne in his great debate with Webster, when he said that if Congress

> "*may use a power granted for one purpose for the accomplishment of another and very different purpose, it is easy to show that a Constitution on parchment is worth nothing.*"

department of the Government limitations upon the exercise of its acknowledged powers" was mere obiter. This decision means nothing more than that the "acknowledged," *i. e.*, conceded powers, cannot be restricted by the judiciary to prevent some supposed injustice. If, therefore, the Constitution had given the Federal Government power to regulate journalism and provide the conditions under which a newspaper could be published, the judiciary could not limit the power because a particular method of enforcing it seemed unwise or unjust. Much less could it invalidate such method, because the Judiciary believed that the methods of Congress were improper and inconsistent with the spirit of the Constitution.

It must also be remembered that in Veazie vs. Fenno, Chief Justice CHASE also said:

> "There are indeed certain virtual limitations arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self government of the States *or if exercised for ends inconsistent with the limited grants of power in the Constitution.*"

Reading these excerpts from this leading case together, it must be obvious that in considering the constitutionality of any statute, we "beg the question" if we first assume the power and then simply deny the right of the Judiciary to place limitations upon its exercise. In Veazie vs. Fenno, this Court did not hold that the motive and object of Congress

might not be very pertinent in determining this primary question of power. On the contrary, this Court ruled that if the legislation were clearly within the Constitution, the motives of Congress were beyond judicial inquiry. This Court has never conceded—and I venture to predict never will concede—that Congress may use a power given only for one purpose for an entirely different and unconstitutional purpose. In this class of cases, reasoning in a circle must be carefully avoided.

A later and more striking case is McCray v. United States, 195 U. S., 27, in which this Court, having under consideration the constitutionality of the designedly prohibitive tax upon oleomargarine, held that the judiciary could not inquire into the "*motive or purpose*" of Congress in adopting a statute levying an excise tax within its constitutional power.

There is no necessary inconsistency between these two lines of decisions.

The latter line of cases are generally, if not invariably, instances of *express* powers, like that of taxation or the regulation of commerce, and as to these this Court has said that they, being what Marshall called "acknowledged powers," the judiciary *ex necessitate rei* can neither limit them further than they are expressly limited in the Constitution nor impeach the power by questioning the uncertain motives of Congress.

A very different question arises and must arise where the exercise of an *implied* power is under consideration. There the law finds no warrant in the

letter of the Federal Constitution. The power has not been expressly granted. It is confronted with the Tenth Amendment, expressly reserving all undelegated powers to the States.

Indeed implied powers are derived from the section of the Constitution which gives "power to make all laws *necessary and proper* for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the Government or in any of its departments or officers." While no narrow, literal and impracticable meaning can now be given to the words "necessary and proper," yet, as Mr. Justice STORY said in his great commentary on the Constitution, these words "are at once admonitory and directory," and they require that the means used in the execution of an express power "should be *bona fide* appropriate to the end."

Hepburn v. Griswold, 8 Wallace, 603, 614.

"Every valid Act of Congress must find in the Constitution some warrant for its passage."

United States v. Harris, 106 U. S., 636.

*An alleged implied power, as in the case at bar, must justify itself by showing that it is "necessary and proper" and "plainly adapted" to carrying out some express power.**

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* State powers and Federal powers are mere complements of each other and to both can be applied the words of this Court in Mugler v. Kansas, 123 U. S., 623.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate

The question in this case, as in every similar case, is not whether this legislation is an exercise of a *delegated* federal power for some ulterior or improper purpose, but whether, having regard to the Constitution as a whole and giving due effect to all the limitations of the Amendments—particularly the Tenth—*the specific legislation is within the true definition of the power.*

When therefore a law is passed under the pretense of exercising a federal power and it is not " necessary and proper," " appropriate " or " plainly adapted " to such power, then the judiciary declares it invalid, not as withdrawing from the Federal Government anything delegated by the Constitution, *but in more accurately defining the nature of the power.*

While this Court has with reason exercised this

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exercise of the police powers of the State. There are of necessity limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (Sinking Fund Cases), 99 U. S. 700, 718, the courts must obey the constitution rather than the law making department of government, and must, upon their own responsibility, determine whether, in any particular case these limits have been passed. 'To what purpose,' it was said in Marbury v. Madison, 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The Courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the Courts to so adjudge, and thereby give effect to the Constitution."

great power sparingly, yet the number of federal enactments that have been adjudged unconstitional is sometimes underestimated. Without pretending to have made an exhaustive search of the authorities, I have found twenty cases in which federal enactments were thus adjudged unconstitutional by this Court. In one of these (the Legal tender Cases) the decision was subsequently reversed. Of the remaining nineteen, twelve were adjudged void for want of power and seven because they contravened some express constitutional limitation. The cases are :

Marbury v. Madison, 1 Cranch, 138. Decided 1803 ;

Dred Scott v. Sanford, 19 How., 393. Decided 1857 ;

Ex Parte Garland, 4 Wallace, 333. Decided 1866 ;

The Alicia, 7 Wallace, 571. Decided 1868 ;

Hepburn v. Griswold, 8 Wallace, 603. Decided 1869 ;

Justices v. Murray, 9 Wallace, 274. Decided 1869 ;

Collector v. Day, 11 Wallace, 113. Decided 1870 ;

United States v. Klein, 13 Wallace, 128. Decided 1871 ;

United States v. Reese, 92 U. S., 214. Decided 1875 ;

Trademark Cases, 100 U. S., 82. Decided 1879 ;

United States v. Harris, 106 U. S., 629. Decided 1882 ;

Civil Rights Case, 109 U. S., 3. Decided 1883;
Boyd v. United States, 116 U. S., 616. Declared invalid 1886;
Monongahela Navigation Co. v. U. S., 148 U. S., 312. Decided 1893;
Income Tax Case, 157 U. S., 429. Decided 1895;
Wong Wing v. United States, 163 U. S., 228. Decided 1896;
Fairbank v. United States, 181 U. S., 283. Decided 1901;
James v. Bowman, 190 U. S., 127. Decided 1903;
Employers Liability Cases, 207 U. S., 463. Decided 1908;
Adair v. United States, 208 U. S., 161. Decided 1908.

In the case at bar the pretense is that the law is an appropriate and necessary means of carrying out the power to regulate the establishment of post offices and post roads and the carriage of the mails. *The declaration of Congress to this effect, while entitled to respect, cannot conclude the question.* It remains for the judiciary to determine whether the means are thus "necessary and proper", "appropriate" and "plainly adapted."

This question presents a graver aspect of this constitutional problem than has ever developed before. The idea has in recent years gained ground among many eminent publicists and statesmen that certain powers granted to the Federal Government can be so utilized as to penalize men into submitting to govern-

mental demands which would otherwise be unconstitutional. In other words, that which the Federal Government cannot do directly, it is attempted to do indirectly.

I call this nullification by indirection.*

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*There is a growing belief in a power of Congress to compel the citizen to do things in themselves beyond the direct powers of the Federal Government, under penalty of a denial of some valuable privilege under the Constitution, such as the facilities of interstate commerce. The section of the Hepburn Bill known as the Commodities Clause, was based upon this novel and most dangerous doctrine that Congress, by reflex action, could compel railroad corporations to do that which otherwise Congress had no power to require, under penalty of being denied the privilege of engaging in interstate commerce.

On this same theory was based Senator Beveridge's Child Labor Bill, which in effect attempted to prohibit the interstate transportation of any commodity, however innocent in itself, if it were the product of child labor. This attempt to compel action in matters beyond the scope of the Federal Government, through a species of statutory duress, gained remarkable ground in the congressional discussion of the Trust problem, where it was again and again suggested that if the federal power could not directly interfere with the formation and operations of large domestic State corporations, it could indirectly by so exercising alleged federal powers as to make it impossible for the State corporations to exist when they reached the commercial dimensions of a so-called Trust.

Thus it was suggested that a destructive internal revenue tax could be imposed as had been done with the currency of State banks; graded excise taxes were proposed to discourage excessive capitalization; the mails were to be denied to monopolistic trusts. The denial to them of a right of appeal to the Federal Courts was also suggested. National banks and other governmental fiscal agencies were to be prohibited from receiving on deposit or accepting as collateral any stocks, bonds or securities of a trust. It was even suggested that the United States Government should not deposit government moneys in any bank, which in any manner deals with the stocks, bonds or securities of a trust. No corporation should engage in interstate commerce without obtaining a federal charter and subjecting its contracts to the supervision of a Government Bureau. Trust made commodities were to be forbidden access to the channels of interstate and foreign trade.

Putting together the two remedies, it must be admitted that they would be sufficiently drastic, for if a large corporation can neither sue in the Federal Court, transport its freight on interstate railroad lines, import its raw material in foreign commerce, telegraph a message, mail a letter or enjoy the usual national banking facilities, its outlawry would be complete.

The present case affords a striking illustration of this new gospel of subverting the Constitution by a perversion of Federal powers, at which the framers of the Constitution would have stood aghast. Following the scheme of unconstitutional duress, the law simply provides that the owners of a newspaper must file with the Postmaster General, and later publish in their newspapers, the names and addresses of the editors, owners, creditors, etc., and the amount of the circulation, and shall brand paid reading matter as an advertisement, and, conscious of its inability to enforce such requirements under any *express* grant of the Constitution, Congress attempts to compel the owners of newspapers to submit to these unlawful demands by penalizing them with exclusion from the mails and liability to a fine.

Is such duress within any true definition of Federal powers ?

Is it a due regulation of the mails for the Federal Government to say to a citizen, " Unless you do certain things, which we have not otherwise the power to compel you to do, we will deny you the facilities of the mail " ?

If such a right exists, then it must be obvious that our government is not one of effective restrictions. Congress, exercising a group of powers which are absolutely vital to the well being of every citizen, can coerce him into doing anything that Congress requires, under penalty of a denial of the ordinary privileges of a citizen.

Independent of the Bill of Rights, there must be

ex necessitate rei some restriction of the power to use the mails as a club to secure ends not within the scope of the Federal Government.

Could Congress provide that no physician should use the mails unless he has filed a statement giving his name, address, property holdings, liabilities, the number, names and ailments of his patients and a declaration that he would only practice as an allopath? If the power over the mails be plenary and absolute, what clause in the Bill of Rights expressly forbids it?

It is not a question of the motives of Congress or the policy of the law. *It is a question of power* and it is inconceivable that the framers of the Constitution, jealous as they were of the powers of the Government which they had created, would ever have given the Federal Government such power over the private affairs of the American people.

The Authorities.

The decisions of this Court, from its earliest history, leave no doubt that in a proper case the Supreme Court will not permit such nullification by indirection as results from the perversion of federal powers to accomplish indirectly unconstitutional ends.

It cannot be doubted that if Congress had passed the law now under consideration as a special statute and not as a part of a Post Office appropriation bill, and had omitted any reference to the mails, this Court would hold that the Constitution not only did not grant such a supervisory power over the press but by the First Amendment had expressly prohibited it.

Can it be possible that what Congress could not do directly it may nevertheless accomplish indirectly by the pretense that such supervision is necessary in order that the Post Office Department may suitably carry on its important function?

As Mr. Justice BREWER in Fairbank v. United States (181 U. S., 283, 294), speaking of the previous decision of Woodruff v. Parham (8 Wallace, 123), said:

> " In other words, that decision affirms the great principle *that what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly by legislation which accomplishes the same result.* . . . The form in which the burden is imposed cannot vary the substance . . . Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and cannot be evaded by any legislation which, though not in terms trespassing upon the letter and spirit, yet in substance and effect destroy the grant or limitation."

As was said by this Court in Union Bridge Co. v. United States (204 U. S., 364, 397):

> **" If the means employed have no real substantial relation to public objects which the Government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such il-**

legal action. The authority of the courts to interfere in such cases is beyond all doubt."

See, also,
Lochner v. N. Y., 198 U. S., 45;
Mugler v. Kansas, 123 U. S., 623;
Chicago R. R. v. Drainage Comrs., 200 U. S., 561;
Reagan v. Farmers Loan & Trust, 154 U. S., 362.*

Nor can it matter that the law now under consideration may incidentally and to some extent relate to the due administration of the Post Office Department, for even a regulation of interstate commerce may be invalid if its enforcement involves a direct interference with intrastate commerce.

In the Trademark cases, 100 U. S., 82, Mr. Justice MILLER said:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature that it is a regulation of

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* Even where the power asserted is the power to tax—the most sweeping, unlimited and fundamental of governmental powers—this court has found no insuperable difficulty in determining the difference between a tax and a reasonable fee covering expenses to protect the Government against fraud (Pace v. Burgess, 92 U. S., 372); between a tax on exports and a mere stamp duty on a document (Fairbank v. United States, 181 U. S., 283); between a tax and a penalty (Helwig v. United States, 188 U. S., 605); between a tax and an improper burden on interstate commerce (Atlantic Telegraph Co. v. Philadelphia, 190 U. S., 160); between a legitimate regulation of rates and a confiscation of private property (Smyth v. Ames, 169 U. S., 466).

> commerce with foreign nations or among the several States, or with the Indian Tribes. *If not so limited*, it is in excess of the power of Congress. *If its main purpose be to establish a regulation applicable to all trade*, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

Applying the doctrine of these decisions to the case in hand, I submit that this Court should hold either

1. That the law in question is not in substance and effect a regulation of the mails but a regulation of journalism; or

2. That even if the law is to be regarded as an attempt to regulate the mails, the means employed are, to apply the test of McCulloch v. Maryland, not "within the scope of the Constitution", not "appropriate", "not plainly adapted to that end" and not consistent "with the letter and spirit of the Constitution", and not "limited" to a fair exercise of federal power.

I recognize that the power under the Post Office Roads clause has been defined by this Court in Public Clearing House v. Coyne (194 U. S., 497) as "the regulation of the entire postal system of the country".

But what is the postal system of the country? Is it more than the collection, carriage and distribution of letters, documents or other merchandise sent by one

citizen to another? It cannot be questioned that this power embraces the right to exclude from the mails any matter that is unlawful or immoral. In other words, the Government is not required to be an accessory in distributing immoral literature.

As stated in Public Clearing House v. Coyne (*supra*), such regulation includes the power to exclude from the mails any matter that would be "dangerous to its employees or injurious to other mail matter carried in the same packages". But in the opinion in that case, especially in the first clause of the syllabus, it is intimated that the power is not arbitrary, for

> "Congress would have no right to extend to one the benefit of its postal service and deny it to another person in the same class and standing in the same relation to the Government."

I concede that in

> *Ex parte* Jackson, 96 U. S., 727;
> *In re* Rapier, 143 U. S., 110;
> Horner v. United States, *id.*, 207;
> Public Clearing House v. Coyne, 194 U. S., 497,

this Court has recognized a sweeping power in the Federal Government to determine what it shall and what it shall not carry in the mails. But in all these cases the law simply provided that matter that was either immoral or fraudulent should not be carried in

the mails. It did not pretend to prohibit the publication or circulation in any other way of the matter deemed to be immoral or fraudulent, nor did it attempt otherwise to exercise any police power with reference thereto. It simply declined to give the immoral or fraudulent enterprise the assistance of mail facilities. Those who were engaged in the nefarious traffic could, so far as the postal law was concerned, pursue their way undisturbed, provided they did not attempt to use the mails to further their unlawful ends.

All previous laws have always observed this distinction between regulating an exercise of the federal power such as the carriage of mails and punishing generally a given evil. Congress has excluded from the mails any newspaper which contained a lottery advertisement, but it has not legislated with reference to lotteries. The line of demarcation has always been drawn and admits of no dispute.

In the case at bar, however, the exclusion from the mails is but an incident to the law and is merely introduced into the act as a method of compelling obedience to the other provisions. It seeks to compel newspapers to disclose the secrets of their business, not only to the Post Office Department but to the public, and it requires them to notify the public when any reading matter has been inserted for a consideration.

Are these requirements "*appropriate*" to the carriage of the mails? Are they "*plainly adapted*" to that end? In the collection, carriage and distribution of newspapers, how can it matter to the Federal

Government who the editors are, who, the mortgage creditors and what is its circulation.

In the Lottery case (188 U. S., 321) I argued for the Government that the power to regulate interstate commerce was plenary and absolute, but I disclaimed any suggestion that it could be used for any purpose, however arbitrary or remote from the great purposes of the Federal Government. My opponents attempted a *reductio ad absurdum* by arguing that if the power were exclusive and plenary and included a right to prohibit as a regulation, then Congress could

> "arbitrarily exclude from commerce among the States any article, commodity or thing of whatever kind or nature or however useful or available which it may choose, no matter with what motive, to declare shall not be carried from one State to another."

This Court disclaimed any such conclusion and significantly added—

> "We may, however, repeat in this connection what the Court has heretofore said, that the power of Congress to regulate commerce among the States, although plenary, *cannot be deemed arbitrary* since it is subject to such limitations or restrictions as are prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress

> was invested with the general power to regulate commerce among the several States. * * * If what is done by Congress is manifestly in excess of the powers granted to it, then upon the Courts will rest the duty of adjudging that its action is neither legal nor binding upon the people."

The attitude of this Court, however, cannot be doubted since the case of Adair v. United States, 208 U. S., 161, 178, decided 1908.

Congress had attempted to regulate interstate commerce by a law prohibiting an interstate carrier from discriminating against organized labor and in its judgment such a law was necessary to prevent obstructions through labor controversies of the free flow of such commerce.

If, therefore, the doctrine of Veazie Bank v. Fenno and McCray v. United States, were, as the Government now contends, that the judiciary can neither inquire into the motive of Congress in determining the question of power nor restrict the exercise of such power within the limits of the Constitution, but must leave these questions wholly to the discretion of Congress, then it would necessarily follow that this attempted regulation of commerce was constitutional, or at least beyond judicial review. This Court, however, reached the conclusion that, the declaration of Congress to the contrary notwithstanding, Section 10 was not a regulation of commerce. This Court said—

> " Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be

within the competency of Congress under its power to regulate commerce among the States, *must have some real or substantial relation to or connection with the commerce regulated.* But what possible legal or logical connection is there between an employe's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employe is connected by his labor and services. . . . If such a power exists in Congress it is difficult to perceive why it might not, by absolute regulation, require interstate carriers, under penalties, to employ in the conduct of its interstate business *only* members of labor organizations, or *only* those who are *not* members of such organizations—a power which could not be recognized as existing under the Constitution of the United States. No such rule of criminal liability as that to which we have referred can be regarded as, in any just sense, a regulation of interstate commerce. We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 196; Lottery Case, 188 U. S. 321, 353. It results, on the whole case, that the provision of the statute under which the defendant was convicted must be held to be repugnant to the Fifth Amendment and as not

> embraced by nor within the power of Congress to regulate interstate commerce, but *under the guise of regulating interstate commerce* and as applied to this case it arbitrarily sanctions an illegal invasion of the personal *liberty* as well as the right of property of the defendant Adair."

In the Employers' Liability Cases, 207 U. S., 463, 502, decided in 1907, the same question arose as to the power of the Federal Government, to include within an otherwise valid law provisions, which were beyond the power of the Federal Government. There a law was under consideration regulating the liability of interstate carriers for injuries to their employees, but in providing a remedy the law was not restricted to employees while engaged in interstate commerce. This Court held that the law as a whole was unconstitutional.

Incidentally it disposed of the contention, which underlies the Government's proposition in the present case, as to whether Congress can so use its conceded powers as to reach objects beyond its scope. Thus it was there contended that when a carrier engaged in interstate commerce, it thereby subjected itself to the power of the Federal Government, not merely with respect to interstate commerce but as to all its business. To this contention this Court replied—

> " To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress

> with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the States as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

The language of these two opinions, representing the latest expression of this Court, could be applied with little change of language to the present case. As in the Employers' Liability Cases, the Government now contends in substance that if the newspaper publishers of this country wish to enjoy the facilities of the mails, they must do so upon the conditions that Congress imposes and must subject their business details to any regulation which Congress may prescribe as a condition of using the mails.

As in the Adair case, the Government now con-

tends that the mere fact that we wish to enjoy mail facilities makes it competent for Congress to legislate with reference to business details, which have only a very remote if any relation to the carriage of the mails.*

In each of these cases laws were declared invalid because there was no just relation between them and the legitimate object sought to be accomplished.

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* Apart from these recent cases, there are a number of earlier cases equally illuminating. I shall only select a few.

In United States v. Fox, 95 U. S., 670, the validity of an Act of Congress, which made it a penal offense for any person to obtain goods on credit three months before proceedings in bankruptcy, on the false pretense of dealing in the ordinary course of trade, was held invalid, as having no reasonable relation to the federal power over bankruptcy. Mr. Justice FIELD said:

> "Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers * * * may properly be made an offense against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, *unless it have some relation to the execution of a power of Congress or to some matter within the jurisdiction of the United States.*"

In United States v. Reese, 92 U. S., 214, a law passed by Congress in enforcement of the Fifteenth Amendment was held invalid because it went further than was necessary or proper to carry out the power committed to Congress.

Similarly in the case at bar we contend that the Act has gone further than is either necessary or appropriate in regulating the carriage of the mails.

See also—

Dent v. W. Va., 129 U. S., 114;
Cummings v. State of Missouri, 4 Wallace, 277.

II.

The Constitution not only failed to give such power but it expressly forbade it, by the First Amendment, prohibiting any enactment "abridging the freedom of the press".

Assuming for the sake of argument that in the absence of the First Amendment such a censorship of the press would be an implied power incident to the regulation of the mails, yet such power was expressly withheld by the First Amendment, which forbade any law "abridging the freedom of speech or of the press".

All provisions of the Constitution must be read together and thus read together the Constitution virtually provides that Congress shall have the power

> "to establish Post Offices and Post Roads", and for this power "to make all laws which shall be necessary and proper", *provided*, however, that it shall make no law "abridging the freedom of the press."

What is the freedom of the press? To determine this question we must resort to the history of the times, when the Constitution was framed, for the expressions used in the ten Amendments must be given the meaning attached to them at the time the Constitution was adopted (Boyd v. United States, 116 U. S., 616).

Thus interpreted, it cannot be questioned that the liberty of the press means the liberty of free discussion in print, without any restraint save that

which was imposed by the law of libel and by certain axiomatic principles of morality, such as the prohibition either of fraud or obscenity.

With these exceptions, the liberty of the press was the right to print one's opinions, whether they were wise or foolish, whether they were consistent with or contravened accepted ideas or ideals, and to do this *without any restraint by the Government*, save that which was clearly and necessarily demanded to prevent either immorality or fraud.

The necessity of this freedom need not be enlarged upon. Our Government rests upon public opinion and its perpetuity must depend upon the education of that opinion.

It is therefore the policy of our Constitution that no burden shall be imposed upon the press, no restriction upon its rights, no impairment of its influence, excepting only in matters of axiomatic morality and subject always to responsibility at common law for libellous statements.

The restriction of the press has taken two forms, and the struggle over each has marked a different stage in the long battle for the freedom of the press.

The first stage was the censorship of the press. It acted *by anticipation* and its essence was a previous restraint of printed thought and not its subsequent punishment.*

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* Recognizing the enormous power of the press, the Crown in England considered that the licensing of the press was a part of the royal prerogative and it at first attempted to prohibit the printing of anything which was not *vised* by the Government and secondly by vesting the

In 1695 Parliament abolished the whole system of censorship and, as Macaulay has said, this action has "done more for liberty and civilization than the great charter or the bill of rights."

The other and remaining stage of the long battle was the attempt *retrospectively* to censor the press by punishment. Obviously the freedom of the press would be of little value and would be rarely exercised if after freely printing the author or publisher could be subjected to such punishments as were

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exclusive privilege of printing in a few institutions, as the two Universities and the Printers and Stationers Company of London. Later the power was fittingly lodged in the Star Chamber and after the Restoration of Charles the Second, a subservient Parliament again vested it in the Crown.

May's Constitutional History of Eng., Vol. II, pp. 102–6;
Anstig v. Carrington, 19 How. State Trials, 1029;
Erskine's Speech for Th. Carran, Dices Law of the Constitution, p. 274.

It was this form of censorship, even at the hands of the Long Parliament, which in 1648 drew from John Milton his Areopagitica, in which he defended the liberty of the press in unrivalled splendor of rhetoric and prophetically anticipated the day when his "noble and puissant nation" would rouse herself "like a strong man after sleep" and "purge and unscale her long abused sight at the fountain itself of heavenly radiance; while the whole noise of timorous and flocking birds with those also that love the twilight flutter about amazed at what she means and in their envious gabble would prognosticate a night of sects and schisms."

The infamous Licensing Act, against which Milton inveighed in his Areopagitica was constructed on the same lines as the present Act of Congress, for the English Act of September 20, 1649 provided that

> "no person whatever should presume to send through *the post*, carriers or otherwise or endeavor to dispense any unlicensed book", etc.

Then, as now, the plan was to strike at the freedom of communication by exclusion from the mails. It is also interesting to recall that almost the last act of the Star Chamber of malodorous memory was its assumption of power to restrain and publish what it chose to regard as libellous statements.

known to the rigor of the English law. It was soon established that no man could be punished for publishing any writing, unless it was at common law either libellous or criminal in character, and the struggle between freedom and tyranny largely turned on the question as to the method of determining whether a publication were libellous. After a memorable contest, which "shook the foundations of Westminster Hall," it was finally decided in aid of the freedom of the press that a jury and not a magistracy should determine whether the printed matter was unlawful at common law.*

When our Constitutional Convention met, the

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* There is no greater battle in the constitutional history of the English race than that which was waged to defend the rights of a jury and to withhold from the bench appointed by the Crown the power to determine the unlawful character of any printed matter. On the one hand was Lord MANSFIELD, whose great influence induced the twelve judges to claim this vital right for the bench, and on the other hand were the master spirits of the English bar, CHATHAM, CAMDEN, BURKE, FOX, SHERIDAN and others.

MANSFIELD'S decision in King v. Woodfull, in 1770, 20 State Trials, 1895, resulted in an acrimonious debate in Parliament, in which Sargeant Glyn, Dunning and Burke attacked the decision, and Thurlow and Fox defended it. Fourteen years later the question was again debated in the case of King vs. The Dean of Asaph, in which Erskine made his closing argument, but Erskine's contention had been anticipated in the Courts of New York by Andrew Hamilton of Philadelphia, in the famous Zenger case.

Lord KENYON, in Rex v. Cuthill, 27 State Trials, 675, laid down the rule, which was finally adopted, as follows:

> "After all, the truth of the matter as to the liberty of the press is very simple when stripped of the ornaments of speech, and a man of plain common sense may easily understand it. It is neither more nor less than this, that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes what is blamable. This in plain common sense is the substance of all that has been said upon the subject."

struggle was over. The liberty of the press had triumphed and it was then universally recognized both in England and America, that the liberty consisted not merely in freedom from punishment except by a verdict of a jury, *but that it also consisted of exemption from any burdensome or unreasonable restraint.* When therefore the new Constitution was adopted without any bill of rights, the new Government promptly passed, in accordance with the general understanding, the first ten Amendments, and it is significant that in the very first there was this clause that none of the powers previously granted to the Federal Government should be so exercised as to abridge the freedom of the press.

The word "abridge" is most significant. The prohibition is not directed only to such laws as *destroy* the freedom of the press. If so, it might have been argued that any law which restrained the liberty of printing but did not altogether forbid it, was permissible. The Fathers, however, used the word "abridge" meaning thereby "to lessen or diminish." *They desired to preserve the full fruits of the long constitutional struggle.* They wished to have the press enjoy complete freedom, subject only to the qualifications above expressed.

There have been few judicial interpretations of the First Amendment, and this because the liberty of the press as a basic principle is so rooted in the minds of the public that with two exceptions no party has ever attempted to contravene the First Amendment.

In 1798 Congress did pass the Sedition Law, which sought to make libels upon the United States Government punishable, just as libels against the British Government had always been punishable at common law. The constitutionality of the law was bitterly assailed by Jefferson, Madison and others, and the political controversy which resulted, led to the Virginia and Kentucky Resolutions, which contained the germ of nullification and secession. The law was repealed before it ever reached this Court.

In 1836 the question again arose in the heated Anti-Slavery agitation, when an attempt was made to exclude Anti-Slavery literature from the mails. It is to the lasting honor of John C. Calhoun, Chairman of the Special Committee, to whom the proposed law was referred, that, notwithstanding his interest in the maintenance of negro slavery, he denied that the Constitution gave Congress any such power except to prevent the delivery of such matter in States where by local laws it was unlawful. *

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* In the debate that followed, Henry Clay said:

"When I saw that the exercise of a most extraordinary and dangerous power had been announced by the head of the Post Office and that it had been sustained by the President's Message, I turned my attention to the subject and inquired whether it was necessary that the Postmaster General should under any circumstances exercise such a power and whether they possessed it. After much reflection I have come to the conclusion that they could not pass any law interfering with the subject in any shape or form whatever. The evil complained of was the circulation of papers having a certain tendency. These papers, unless circulated and while in the Post Office, could do no harm. It is the circula-

It is to the credit of Congress that after a full discussion the proposed law was voted down by a vote of 25 to 19 on the ground of its unconstitutionality.

I concede that the present form of censorship is mild by comparison with previous forms. I also ad-

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tion solely—the taking out of the mail and the use to be made of them—that constitutes the evil. Then it is perfectly competent for the State authorities to apply the remedy."

To the question of Senator Buchanan, of Pennsylvania, as to whether the Post Office power had not given to Congress the right to determine what should be carried in the mails, Clay replied in the negative, adding:

> "If such a doctrine prevailed, the Government may designate the persons or parties or classes who shall have the benefit of the mails, excluding all others."

Senator Davis said:

> "It would be claiming on the part of the Government a monopoly and exclusive right either to send such papers as it pleased or to deny the privilege of sending them through the mail. Once establish the precedent, and where will it lead to? *The Government may take it into its head to prohibit the transmission of political, religious or even moral philosophical publications*, in which it might fancy there was something offensive, and under this reserved right, contended for in this report, it would be the duty of the Government to carry it into effect."

He also denied

> "the right of the Government to exercise a power indirectly which it could not exercise directly, and if there was no direct power in the Constitution, he would like to know how they would get the power of the States—legislative power at most."

Daniel Webster expressed himself as "shocked" at the unconstitutionality of the proposed law, saying:

> "Any law distinguishing what shall or what shall not go into the mails, founded on the sentiments of the paper and making a Deputy Postmaster a judge I should say is expressly unconstitutional."

mit that a large majority of the newspapers could submit to this censorship without any practical impairment of their liberty to print or diminution of their influence. But it is equally true that this form of censorship would in many instances affect disastrously the liberty to print. It is a reasonable possibility that the enforcement of this law might destroy some newspapers. It is certain that with the exception of the limited few newspapers which enjoy an immense circulation, this form of censorship would impair the influence of many newspapers.

The clause with reference to printing paid matter as an advertisement would in many instances destroy the opportunity of classes and individuals to get their views before the public.

If these suggestions are true, then the freedom of the press is abridged in that there is not the same full, free, unimpaired right to print and circulate newspapers as existed before the passage of the law.

Without amplifying all of the destructive possibilities of the law, it will suffice to discuss three which are apparent on its face—

1. The law provides that a newspaper must disclose its circulation not only to the Government but to the public. Such disclosures would in many instances go far to destroy the influence of the paper in the minds of the masses, and that without justice or reason. A newspaper having a circulation of 30,000 may have more real influence than a news-

paper having a circulation of 300,000. The first newspaper may find its readers among the educated, thoughtful and influential class, whose views profoundly affect their fellow men. The other newspaper may be read largely for its sporting page or its divorce reports. At present the influence of both papers is measured largely by the comparative character of their editorial utterances, but if it were published to the world that one reached but 30,000 readers and the other 300,000, the influence of the first paper would be substantially impaired.

Such impairment might result in destruction, for it is well known that a newspaper pays its way by advertisements and not by the copies which it sells. The latter, apart from advertisements, are sold at a loss, and anything that destroys the advertising business strikes the newspaper a fatal wound. It is safe to say that there is not a newspaper in the United States that could be continued at a profit, if its advertisements are withdrawn. Manifestly a disclosure of circulation to the public would lessen the business of the paper of small circulation and increase that of the paper with a large circulation, and this notwithstanding the fact that the paper of 30,000 readers might be a far more valuable advertising medium than the one with 300,000.

A great objection to this legislation is therefore that it weakens and tends to destroy the class of papers which most needs freedom from undue interference. The disclosure to the public of the intimate

details of business management would in many cases tend to drive the weak newspaper to the wall, for, armed with this knowledge, the strong and wealthy newspaper could readily impair the influence of its weaker rival, secure its business and drive it to the wall. There is possibly in no industry keener competition than exists between newspapers and therefore in none is there greater need on the part of the weaker competitors of privacy as to their business details.

There may be no absolute right of privacy and yet the owner of a business is entitled to safeguard the secrets of his business unless there is some reasonable and just occasion for a compulsory disclosure to the public of his private affairs.

As was said by Mr. Justice FIELD, in *in re* Pacific Railway Commission (32 Fed. Rep., 241, 250):

> "Of all the rights of the citizen few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault *but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value.*"

This right of privacy and the sanctity of one's books and papers were never better emphasized than in the case of Boyd v. United States (116 U. S., 616), where Mr. Justice BRADLEY, in one of the ablest defenses of personal liberty, to which this Court ever gave utterance, defended the right of privacy against

oppressive federal regulations, even though they were enacted in execution of the most drastic of all governmental powers—the power of taxation.

There was far more justification, from the standpoint of the public interests, for the legislation which this court condemned in that case, than can be urged in behalf of the newspaper statute, whose obvious effect would be to impair the credit of the weaker newspapers, alarm their creditors and advertisers, impair their just influence with their readers, without in any manner assisting the Government in the effective and economical carriage of the mails.

2. The provision that there shall be a public disclosure of the editors and owners of the newspaper abridges the right to disseminate ideas impersonally.

I freely recognize the prejudice which to-day ordinarily and generally justly prevails against anonymity. But even anonymous arguments have played a useful art in past struggles for liberty and progress. To this day we do not know who wrote the letters of "Junius", and yet these letters were some of the most forceful blows struck in the great struggle for English freedom.

When the Constitution was submitted to the people for adoption, the most valuable arguments in its support were those submitted anonymously by Madison, Hamilton, Jay, Sullivan, Winthrop, Gerry, Ellsworth, Roger Sherman, Pinckney and many others. These were published under such *nom de plumes* as Publius, Cassius, Agrippa, Cato, Caesar, Sidney, Plain Dealer, Columbian Patriot, Plebian, etc., etc.

It is altogether probable that the Federal Constitution would never have been adopted by a sufficient number of States had it not been for the anonymous political pamphlets written over the *nom de plume* of "Publius", which we now know as the Federalist Papers. While Hamilton's identification with "Publius" was soon suspected by many, it was not until long after his death that it was known that many of these papers were written by Madison, Jay and others.

Nothing was more familiar to the framers of the Constitution than this method of impersonal pamphleteering.

When the burning issue of neutrality arose in the administration of Washington, Hamilton assailed the Secretary of State in pamphlets written under the *nom de guerre* of "Pacificus," and Madison replied under the name of "Helvedius." It was the exception when any political argument or other reading matter was written over the true name of the author. Franklin, while agent of the colonies in London, published his most effective arguments in their behalf anonymously in the English press.

Tempora mutantur, et nos mutamus, etc. Constitutional rights do not change and to-day a man has still a right to submit his views impersonally to his fellow men and if his personality unfairly prejudices the intrinsic merit of his facts or opinions he may on occasion be justified in withholding his name in order not to obscure the merits of what he advocates. If this be true of fugitive expressions, it is

especially true of a great continuing organ of public opinion like a newspaper.

As in interpreting the Constitution recourse must be had to the standards of thought and conduct of its framers, in order to determine its meaning and scope (So. Carolina vs. United States, 199 U. S., 437), it should be remembered *that no abridgement of the freedom of the press would have excited more opposition among those who framed the constitution than the compulsory disclosure of authorship.* They would have felt that an invaluable weapon against error had been taken from their hands.

An instance could reasonably be imagined of a man of large means, justly or unjustly unpopular with the masses, who might desire to submit either in his own defense or for the public good, some facts, ideas or proposed laws. For this purpose, he acquires a newspaper. If the fact of his ownership is known, he will not get any adequate hearing and his ideas, however intrinsically meritorious, would receive an exceedingly scant hearing. Has he not the same *right* to disseminate through the press his views impersonally, as another man has to do so over his signature ?

3. The provision as to paid matter goes a step further. Here is an undoubted attempt to impair the freedom of the press by the destruction of its influence. A man can only reach the minds of his fellow men on a large scale through newspapers or periodicals. He may have some idea or plan for the ultimate good of his fellow men, but of which his fellow man,

as so often happens, is ignorant. His ideas may be so novel as to excite little interest at first. Perhaps they are also unpopular. It cannot be expected that the owner of a newspaper will always donate his space and the labor of his printing establishment without compensation. If the man wishes to reach his fellow men, therefore, he must pay the newspaper for the privilege of using its columns.

The matter referred to may have no reference to merchandise or to anything commercial. In no sense can its insertion be regarded as a commercial advertisement. The opinions which he expresses are reading matter. If marked as an advertisement, the influence is largely impaired.

Take, for example, the campaign committee of a political party. It wishes to get before the people of the country certain facts with reference to operations of the tariff. If inserted in the newspaper as an advertisement, few will read it and those few will not give to the paid advertisement the serious attention which the article may deserve. The newspaper publishes it as reading matter and requires the Committee to pay the reasonable cost of the service. Does not the requirement that it be printed as an advertisement, with the destructive effect upon its influence as reading matter which such a branding necessarily entails, involve an abridgement of the freedom of the press? Is that freedom as complete and unimpaired after such a law is passed as before?

III.

The requirement that a certain class of newspapers shall disclose the most intimate details of their business and use their own capital, labor facilities and valuable space for such disclosure, is a taking of "liberty" and "property" without due process of law and a like taking of valuable property rights for an assumed public use without just compensation.

The Post Office power must also be regarded as subject to the Fifth Amendment.

I do not contend that the mere compulsory disclosure of ownership, editorial management and other business details to the Postmaster General is a taking of property without due process of law.

The Act goes further. It compels the newspaper proprietor twice a year to use the valuable space of his paper and his capital and labor facilities to print the statement. To set up the matter, print it, and distribute it, all require expenditure of capital. It is an enforced appropriation of valuable space for the assumed benefit of the public. It is as much a taking of property as if it compelled the owner to hire a hall and announce the facts to the public.

Even though this compulsory appropriation of the citizen's property and labor were not strictly a *physical* taking of his property, nevertheless it is a "taking" within the meaning of the Constitution. It was well

said by the Court of Appeals of New York, in Forster vs. Scott (136 N. Y., 584):—

> "Whenever a law deprives the owner of the beneficial use *and free enjoyment of his property, or imposes restraints upon such use and enjoyment*, that materially affect its value, without legal process or compensation, it deprives him of his property within the meaning of the Constitution. *All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession.* It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner."

This interpretation of the Constitution only followed the undoubted doctrine of this Court, for this Court said, in Lawton v. Steele (152 U. S., 137):—

> "The legislature may not, under the guise of protecting the public interests, *arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.* In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus an act requiring the master of a vessel arriving from a foreign port to report the name, birth-

> place, and occupation of every passenger, and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the State against any expense for the support of the persons named for four years thereafter, was held by this court to be indefensible as an exercise of the police power, and to be void as interfering with the right of Congress to regulate commerce with foreign nations. *Henderson v. New York, 92 U. S., 259.*"

As was said by Mr. Justice FIELD in Munn v. Illinois (94 U. S., 141) :—

> " All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title or possession. *If the constitutional guaranty extends no further than to prevent a deprivation of title and possession and allows a deprivation of use and the fruits of that use, it does not merit the encomiums it has received.*"

This contention is strengthened when it is remembered that no other citizen desiring the use of the mails is subjected to any such requirement. Scientific, religious and temperance publications are relieved of any such expense, and as to circulation, all but daily newspapers are similarly exempted. The law therefore puts upon daily newspapers an unfair expense and a burden not imposed either upon other publishers or upon any other class of citizens.

Freely granting the power of classification, there is here such an unreasonable discrimination as to amount to a denial of the equal protection of the laws, and that phrase is synonymous with due process of law.

To amplify this argument would require a restatement of all that has been herein said as to the unreasonable character of this regulation. It is enough to say that not only does the Act seek to appropriate the space of newspapers without compensation, for an assumed public use, but it interferes with the liberty of contract in that a newspaper owner may not contract with one desiring to use his columns for the insertion of reading matter, except under burdensome conditions.

The law as a whole singles out the owners of newspapers and attempts to aim at them an oppressive postal regulation, which clearly offends the intimation given by this Court in Public Clearing House v. Coyne (*supra*), that

> "Congress would have no right to extend to one the benefit of its postal service and deny it to another person in the same class and standing in the same relation to the Government."

Conclusion.

I need not emphasize the importance of this case. As already stated, the form of censorship now sought to be imposed upon the press of the country may seem mild by comparison with that of other countries in former times. The concession to Congress of the power to utilize the mails for the purpose of disciplining the free press of the country, would mean hereafter a stricter and more dangerous censorship, for in the matter of arbitrary power, "the appetite grows by what it feeds on."

The warning words of Mr. Justice BRADLEY, in Boyd v. United States, 116 U. S., 616, should never be forgotten:

> "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. * * * It is the duty of Courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Respectfully submitted,

JAMES M. BECK.

New York, November 20, 1912.

APPENDIX.

The Newspaper Law.

" (Public No. 336)
" (H. R. 21279).

" An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes,

" *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following sums be, and they are hereby, appropriated for the service of the Post Office Department, in conformity with the Act of July second, eighteen hundred and thirty-six, as follows: * * *

"SEC. 2. * * * That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and scientific, or other similar publications: *Provided, Further*, That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds.

mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

"That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked 'advertisement.' Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised, without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500)."

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 919.

THE LEWIS PUBLISHING COMPANY,
a body corporate in law,
Complainant-Appellant,

against

EDWARD M. MORGAN, Postmaster in and for the
City of New York,
Defendant-Appellee.

THE INVALIDITY OF A FEDERAL CENSORSHIP OF THE PRESS.

APPELLANT'S REPLY BRIEF.

JAMES M. BECK,
Counsel for Appellant.

C. G. Rossevere, 71 to 78 Spring Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1912.

THE LEWIS PUBLISHING COMPANY, a body corporate in law,
Complainant-Appellant,

AGAINST

EDWARD M. MORGAN, Postmaster in and for the City of New York,
Defendant-Appellee.

No. 819.

REPLY BRIEF FOR APPELLANTS.

The ingenious brief of the learned Solicitor General reached me too late to permit of any but a brief reply.

The construction, which he has attempted to place upon this unambiguous statute in order to save its constitutionality, does plain violence both to the letter of the statute and the clear indications of its meaning and purposes, as disclosed by its proponents in Congress (See Appellant's brief, page 5).

Where the scope and object of a statute is a pertinent matter, this court will resort to the history of the legislation and the declared purposes of its proponents. (See United States v. Press Co., 219 U. S., p. 1.)

The Act itself is plain and unambiguous. It is made "the duty of the editor, publisher, business manager or owner of *every newspaper*" to comply with certain requirements, and failure to do so subjects the publication to a denial of "the privileges of the mail"—not the advantages of second-class rates only, but "the privileges of the mail" for any purpose connected with the publication, such as the receipt of subscriptions or of literary contributions to its columns. This negatives the theory of the Solicitor General that these requirements are merely a condition of the lower rates of postage.

I fully recognize that when a statute is "*reasonably* susceptible of two interpretations," and one of them is of doubtful constitutionality, the Court will accept the remaining interpretation. (United States v. Delaware & Hudson R. R. Co.

The words just quoted are from the opinion of this court in that case, and in applying the doctrine, the italicised adverb must always be borne in mind.

This Court will not construct a new statute to save the face of Congress. It will give full credit to the reasonable meaning of Congress and if that be in violation of the Constitution, this Court will say so.

U. S. v. Reese, 92 U. S. 214.
James v. Bowman, 190 U. S. 127.

In the latter case, this Court said that—

> "Courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fit some particular transaction, which Congress might have legislated for, if it had seen fit."

This question of interpretation is of minor importance, for even if the construction of the Solicitor General be accepted, it is none the less unconstitutional. The difference is one of degree, but not of kind.

Accepting for the sake of argument the Solicitor General's interpretation, I still contend that Congress may not utilize the advantages of second-class rates to *induce* a newspaper to submit to unconstitutional requirements.

Congress can neither enlarge the powers of the Federal Government over the newspaper press by the duress of exclusion from the mails, nor can it do so by bribing the press by the offer of special rates.

In either event it is, to use Marshall's apt language in McCulloch v. Maryland, attempting

> " under the pretext of executing its powers (to) pass laws for the accomplishment of objects not entrusted to the Government,

and such an act is not

> " the law of the land."

As to the constitutionality of the statute, three possible defenses were open to the Solicitor General.

The *first* was to argue that the requirements of this statute are "appropriate" and "plainly adapted" to the effective and economical carriage of the mails and as such within the implied powers of Congress.

The *second* was to argue that while these statutory requirements are of questionable appropriateness, nevertheless Congress can prescribe the *conditions* upon which second-class rates will be granted, however foreign such conditions may be to the regulation of the mails.

The *third* was to assert that without respect to such regulation, Congress has the absolute and unrestricted power to determine upon what conditions the citizen can use the mails.

Apparently the Solicitor General had little confidence in the first contention. He makes little, if any, effort to argue that these statutory requirements have any legitimate relation either to the effective or economical carriage of the mails or to the classification of mail matter. He does not dispute that the branding of paid matter as an advertisement or the enforced publication of the details of a newspaper publication in its own columns, for the sake of the public, have no bearing upon the question either of the physical carriage of such newspapers or its equitable contribution to postal expenses.

The Solicitor General bases his contention upon the second and third defenses. Between these there is only a difference in degree. The contention is essentially the same, that either by the *duress of a*

threatened exclusion from the mails or by the *inducement of special privileges* as to rates, Congress is competent to effect objects, which the Solicitor General practically concedes are not in themselves appropriate subjects for federal legislation.

The Solicitor General does not shrink from the logic of his contention. With admirable sincerity and with even greater courage he accepts and asserts the full logical extreme of that contention. He boldly asserts that the power of Congress over the mails is "absolute" and "unrestricted" and that it can use such power for any purpose, however it may otherwise transgress the limited powers of Congress, ~~and however it may offend "the letter and spirit of the Constitution."~~

A more amazing and radical contention has never to my knowledge been submitted to this court.

That I may not be charged with misstating his contention, I quote several typical passages in the Government's brief:

> **"As an incident to that vast development Congress has, and of necessity must have, absolute power to say what it will exclude from and what it will carry in the mails and the terms, conditions, and postal rates on which it will carry mail matter"** (p. 22).

And again:

> "We submit, therefore, that Congress has the *unrestrained power* to say what in its

> opinion is so hurtful to the public welfare that it shall not pass through the mails; and it *may enforce that opinion without its correctness being subject to judicial review.*" (p. 34).

And again:

> " It surely may prescribe *any* conditions concerning the mail matter itself, whether as to size, weight, *character of contents, purpose for which sent, etc., and it may likewise prescribe conditions concerning the person depositing it in the mail*, especially if the conditions attached to the sender bear some relation to the thing sent." (pp. 36, 37).

And again:

> " Congress, from time to time, has the *absolute* right to determine for itself whether this or that matter is injurious to the public and therefore should be excluded from the mails or from some favored use thereof." (p. 46).

Nor does the learned Solicitor General, in translating into concrete illustrations these startling assertions of " absolute " and tyrannical power, hesitate to suggest those which would be peculiarly offensive to our form of Government and especially dangerous to free institutions.

He says:

> " Again, in the brief for the Journal of Commerce (p. 39) it is suggested that if this

act be upheld there will be nothing to prevent Congress from denying the use of the mails to (or fining) newspapers which are owned by individuals *advocating certain political theories.* A possible abuse of power is no argument against its existence, but we may as well observe that a denial of the mails to a paper because of its ownership or the views held by its owners may well be illegal (pp. 38–40, *supra*), as having no relation to the thing carried in the mails *unless the views are expressed in the paper; but if such views are expressed in the paper Congress can doubtless exclude them, just as Congress could now exclude all papers advocating lotteries, prohibition, anarchy, or a protective tariff, if a majority of Congress thought such views against public policy.*" (*pp. 46, 47*).

If, therefore, the next Congress should pass a law that no newspaper should be admitted to the privileges of second-class matter unless its editorial columns should support the views of the majority in the next Congress as to a revision of the tariff, the judiciary would be powerless to prevent such a strangling of free discussion.

If so, it must logically follow that the next Congress could not only bribe the newspaper press of the country into acceptance of lower tariff duties, by the privilege of cheap or free postage, but it could force them into such acquiescence by a denial of any mailing facilities whatever.

The contention of "absolute power" now put forth

without reservation is the very one at which Daniel Webster, when a like proposition was made to purge the mails from anti-slavery political documents, was "shocked" and to which the great interpreter of the Constitution replied:

> "Any law distinguishing what shall or what shall not go into the mails, founded on the sentiments of the paper and making a Deputy Postmaster a judge, I should say is expressly unconstitutional."

That neither the next nor any American Congress would so offend the spirit of our institutions does not affect the test of such an illustration.

If the Solicitor General's contention be correct, the illustration quoted by him from the first draft of my brief, on page 37 of his brief, would be apt, for under this theory of federal power, Congress could provide that no editor or publisher could use the mails unless he filed an agreement with the Postmaster General to "vote the prohibition ticket, support the suffragette cause" and appropriate half of his columns to the advocacy of these political views.

While the Solicitor General intimates that these conditions "have no possible relation either to the articles mailed or to the use of the mails" yet he has argued that Congress has "*absolute*" power and "*may likewise prescribe conditions concerning the person depositing it in the mail*, especially if the conditions attached to the sender bear some relation to the thing sent." (p. 37).

The Government's contention, therefore, does not limit the power of Congress to prescribe conditions as to the thing sent, but also as to the sender, and if this power be an "absolute" power, then it can determine the conditions upon which the postal facilities can be used, and it logically follows that the conditions can refer to the citizen who uses the mails as well as to the mail matter itself.

If this be true, the advocates of a judicial recall need not waste further effort in advocating that method of overriding the Constitution, for Congress can readily accomplish many purposes, which under the Tenth Amendment were reserved to the States and the people thereof, by the simple device of compelling the citizen to do things, in themselves beyond federal power, if he wishes to use the mails.

For example, take the illustration used by the Solicitor General on page 40. He says that while Congress "has no power to regulate the insurance business," yet "it may be quite competent for Congress to say that all matter transmitted by insurance companies in the mails should possess such and such qualifications or be excluded." Therefore Congress, possessed of no power over insurance as such, could provide that no insurance company, which did not have certain corporate characteristics, could transmit anything through the mails, or that it could not transmit through the mails a policy of insurance or accept the premiums therefor unless the policy was of a standard form prescribed by Congress.

The power therefore denied by this court to the

Federal Government under Paul v. Virginia could be easily accomplished by prescribing that no insurance company could use the mails unless it conformed to the requirements of an insurance code, which Congress would provide. As no insurance company could transact its business without the use of the mails, this would make entirely practicable a federal supervision of insurance by compelling insurance companies to accept federal requirements, if they wished to use the mails.

In Adair v. the United States (208 U. S., 161), this Court declared invalid an act which prohibited an interstate carrier from discriminating against organized labor. Could Congress now pass a law that no railroad corporation could use the mails unless it agreed to employ only Union labor?

In the Employers' Liability case (207 U. S., 463) this court adjudged unconstitutional a law prescribing liability to injured employees because it applied to employees of interstate carriers when not engaged in interstate commerce. Could Congress pass a law that such interstate carriers could not use the mails unless they filed an agreement with the Postmaster General to compensate all injured employees, whether engaged in interstate commerce or not?

To show that these illustrations are not fanciful, I venture to call to the attention of the court the current suggestion that while the Federal Government has no power over clearing houses or stock exchanges, they being local commercial facilities and

not instrumentalities of interstate commerce, Congress can compel such institutions to conform to federal laws by the simple expedient of denying them the use of the mails unless they agree to accept such conditions as Congress may prescribe.

This case and the contention of the Government therein has drawn the issue very sharply between an arbitrary and unrestricted government and a restricted and free government.

Either Congress has, as the Solicitor General contends, the power to prescribe " absolutely " and without the possibility of judicial review, the conditions on which the citizen shall use the mails, or Congress has only the power, in carrying out its great function as a carrier of the mails, to prescribe such conditions as have a legitimate and appropriate reference to that function.

Between these two propositions there seems to be no middle ground. Either the power is absolute and unrestrained, however tyrannical its exercise, or the power, only vaguely enumerated in the Constitution, was delegated for a special purpose and the true definition of the power is limited to that purpose and all acts done under the pretense of exercising that power but beyond its legitimate scope, are unconstitutional.

That this belief in the arbitrary right of Congress to pervert federal powers to accomplish unconstitutional ends is a growing doctrine in the political life of this nation is shown in the foot note to page 18 of

my brief, in which I have suggested only a few of the many propositions which have been advanced in recent years to pervert federal powers to attain unconstitutional ends.

No encouragement is found for so pernicious and destructive a doctrine in the decisions of this court.

While asserting the exclusive and plenary power of Congress over interstate commerce in the most emphatic language (See Lottery cases, 188 U. S., p. 321), it has in the same case denied that even a plenary power could be "arbitrary."

While it has asserted the complete power of Congress to determine what shall and what shall not be carried in the mails, yet these general expressions cannot sanction arbitrary use of such power, and this court has never meant that conditions could be imposed upon the exercise of a vital right, which have no legitimate relation to the carriage of the mails.

If this court shall sustain the contention of the Government and thus declare that Congress has an absolute power to declare what the citizen must do in order to avail himself of postal facilities, then we may expect a wide and indefensible extension of federal power, of which neither the generation that framed the Constitution nor any succeeding generation, except the present, would have dreamed as a possibility.

How the statesmen of the middle period of our history would have viewed such an extension of federal power, is indicated by the quotations of my

brief, in which Henry Clay, John C. Calhoun and Daniel Webster agreed that no such censorship of the mails could exist in our free government (pp. 37, 38).

To the framers of the Constitution the proposition now advanced would have been unthinkable. At the time the Constitution was adopted, Dr. Benjamin Rush, one of its signers, said as to the function of the post office:

> "For the purpose of diffusing knowledge, as well as extending the living principle of government to every part of the United States —every state, city, county, village and township in the Union should be tied together by means of the Post Office. This is the true non-electric wire of government. It is the only means of conveying heat and light to every individual in the federal commonwealth. 'Sweden lost all her liberties,' says the Abbe Raynal, 'because her citizens were so scattered, that they had no means of acting in concert with each other.' It should be a constant injunction to the post-masters, to convey newspapers free of all charge for postage. They are not only the vehicle of knowledge and intelligence, but the sentinels of the liberties of our country."

Should this court sustain the contention of the Government in the case at bar, then its great declaration, through Chief Justice MARSHALL, that Congress may not "under the pretext of executing its powers,

pass laws for the accomplishment of objects not entrusted to the Government" will become for many practical and vital purposes a dead letter.

Respectfully submitted,

JAMES M. BECK,
Counsel for Appellant.

New York, November 30, 1912.